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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 194

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ROUL MATEUS,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.**

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MORRIS LAVINE,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

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# No. 194

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ROUL MATEUS,

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THE UNITED STATES OF AMERICA.

---

## PETITION FOR WRIT OF CERTIORARI.

---

*To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices thereof:*

Your petitioner, Roul Mateus, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review the judgment of that court entered on March 19, 1942, which also denied a rehearing on June 2, 1942. The judgment of the Circuit Court affirmed the judgment of the District Court.

### Summary and Short Statement.

The appellant-petitioner was a police officer of the City of El Centro, California. All the other convicted defendants, who are not appellants in the case, were Japanese.

From the evidence and from the opinion of the Ninth Circuit Court of Appeals, it appears that there were rival Japanese gamblers, and that Hideichi Yamatoda, the alleged kidnap victim in the case and the other Japanese involved were either friends or rivals dating back as far as 1938. Yamatoda, the alleged victim, was once arrested and tried for murder, upon information furnished by his rivals (R. 38-43).

Yamatoda, the alleged kidnap victim, was arrested in Los Angeles County on a warrant issued by the Police Court in El Centro. El Centro, twelve miles from the border, is the county seat of Imperial County. The border between Mexico and California runs to the county, Mexico being on one side and Imperial County on the other. Calexico, U. S. A., and Mexicali, Mexico, are divided by a common street.

It was the Government's theory that after Yamatoda was released from jail he was put in the turtleback of an automobile, driven over into Mexico and ejected from the automobile. Yamatoda made a statement to Mexican immigration officials that he walked across.

The Government charged two counts in its indictment. Count One charges the crime of kidnaping, alleged to have been committed on or about December 23, 1938, in that the appellant "did on or about December 23, 1938, in the Central Division and Southern District of California, unlawfully, willfully, knowingly, and feloniously transport and cause to be transported, and aid, assist, and abet in transporting in foreign commerce from the City of Los Angeles, California, to the City of Mexicali in the Republic of Mexico, a certain person named Hideichi Yamatoda who had theretofore been unlawfully seized, conveyed, inveigled, decoyed, abducted, and carried away, and who was then and there being held by the said defendants for ransom and otherwise."

Yamatoda's trial for murder in California is reviewed on appeal in *People* v. *Kinowaki*, 39 Cal. App. (2d) 376, 103 Pac. (2d) 203.

The second count of the indictment charges that the defendants at some time prior to December 22, 1938, the exact date being unknown, and continuously thereafter, up to the date of the return of the indictment, "did unlawfully, willfully, knowingly, and feloniously conspire, combine, confederate, and agree together and among themselves, and with others to the Grand Jurors unknown, to unlawfully, willfully, knowingly, and feloniously transport and cause to be transported, and aid, assist, and abet in transporting in foreign commerce, from the City of Los Angeles, California, to the City of Mexicali in the Republic of Mexico, a certain person named Hideichi Yamatoda who had theretofore been seized, conveyed, inveigled, kidnaped, abducted and carried away by the said defendants and was then and there being held for ransom and otherwise."

The second count further charges that the defendants committed certain overt acts among which are the following, allegedly committed by the appellants in this case:

> "1. On December 23, 1938, Yuge transported Yamatoda from Indio, California, to El Centro, California.
>
> "2. On December 23, 1938, Ota shoved Yamatoda into the turtle back compartment of an automobile on the outskirts of El Centro, California.
>
> "3. On December 23, 1938, Sonoda rode in the turtle back compartment of an automobile with Yamatoda from El Centro, California, to Mexicali in the Republic of Mexico, and ordered Yamatoda to be quiet en route.
>
> "4. On December 23, 1938, Yoshido assisted others in forcing Yamatoda into the turtle back compartment as aforesaid.
>
> "5. On December 23, 1938, Mateus was in Mexicali in the Republic of Mexico to which Yamatoda had been forcibly transported."

Other overt acts are alleged to have been performed by the other defendants, all relating to the alleged conspiracy to transport Yamatoda after the kidnaping and seizure had allegedly occurred.

The jury found the petitioner guilty of kidnaping, but disagreed as to the conspiracy charge, and disagreed as to both counts with reference to Chief of Police J. Sterling Oswalt, and the indictment as to Oswalt was subsequently dismissed.

The story told by Yamatoda was highly fantastic, and petitioner contends, was grossly and inherently improbable. There was produced in evidence Exhibit 56, a statement given by Yamatoda, to the effect that early in the morning of the 24th of December he entered Mexico under the following conditions:

That while visiting in the City of Calexico (the border town between U. S. A. and Mexico) he took a street which he didn't remember; continued walking until he noticed by the names on the business establishments that he was in a place that was not the United States; he then went toward a building where there was a light—apparently with the result that he found the place was a police station. He was detained and referred to the Immigration Office (R. 369). He further stated, in answer to the question "When did you enter Mexico?" "A. I discovered that I was in Mexico when I presented myself at the local police station. I did not know that it was the police station" (R. 369).

The statement also says: "Q. Were you accompanied by any other person when you entered Mexico? A. I came alone" (R. 370).

The witness explained in the trial of the case that he gave this statement in Mexico to the Immigration Office on a promise that if he signed it he would be back in the United States within ten days or two weeks (R. 362).

The appellant Roul Mateus, petitioner herein, was supposed to have ridden in an automobile with another officer named Keating, who was at the wheel of the car from El Centro. Keating was not prosecuted and denied that he ever drove the automobile. Mateus also denied that he ever went to Mexico with Yamatoda. It is not contended that Mateus had anything to do with Yamatoda in Los Angeles or before Yamatoda got to El Centro.

The Government's entire case shows that Mateus' name did not even enter the picture until the night of December 24, 1938.

The presentation of the Government's case on the theory of a conspiracy dated back to 1937 in New York City and to subsequent events between the various Japanese dating from September, 1938 and December 24, 1938.

The only evidence to show that there had been any transportation of Yamatoda in interstate commerce was the hearsay testimony of Yamatoda that another Japanese said to him, "This is Mexico," and that he walked on a few blocks, at which time he discovered himself to be at the Mexican police station. Whether he was in Mexico, or in the United States at the border, was left to conjecture.

There was no independent evidence to show that Mateus was along or that Yamatoda ever knew Mateus or had seen him before that night in question, or that the person he saw was, in fact, Mateus.

There was no evidence to show that Mateus ever held Yamatoda for ransom or reward or otherwise, or that he had any knowledge that anyone was holding Yamatoda for ransom or reward or otherwise.

The jury convicted the Japanese Kamanosuke Yuge as to Count Two and disagreed as to Count One. Setsuzo Ota was found guilty on both counts; Kazuji Sonoda guilty on both counts; Richard Iwao Yoshida guilty on Count Two, the jury disagreeing on Count One; Tokogiro Naka-

shima, acquitted on both counts; Frank Ugawa, acquitted on both counts, court's direction; Frank Asanuma, acquitted on both counts, court's direction.

Officer Mateus, the only non-Japanese, was found guilty on Count One, and there was a disagreement on Count Two.

Louis W. Henry, dismissal as to both counts.

J. Sterling Oswalt, disagreement as to both counts.

The District Court refused to direct the verdicts regarding Mateus, and refused to strike from the evidence all the testimony relating to events which took place prior to the appellant Mateus ever having entered the picture. These portions are set up under the assignment of errors (R. 1043-1079).

The Circuit Court affirmed the decision of the District Court (R. 1088) but stayed the mandate until further orders of the Court (R. 1089).

**Questions Presented.**

1. Where a witness, a professional Japanese gambler, claims to have been kidnaped by rival Japanese gamblers and transported in foreign commerce from the United States into Mexico from a county which borders on the international boundary line, is the evidence substantial if he does not know where the place is where he got out of the automobile? Where the place could or could not be the United States, and where the Japanese has made a sworn statement to a Mexican Immigration official that he came across the border alone,—is such evidence sufficient to overcome the presumption of innocence which clothes all persons accused of crime?

2. Where the accused was a police officer of a city in a border county, and is not shown to have had any knowledge of any of the acts, transactions or occurrences in an alleged conspiracy, is the verdict of a jury finding the accused guilty

of the substantive offense of kidnaping inconsistent with the disagreement by the jury regarding the guilt or innocence as to the conspiracy to kidnap, especially where the facts were such that the accused could not have been guilty of kidnaping unless he was guilty of conspiracy?

3. Where an American police officer of the principal city of a border county is charged with transporting a Japanese gambler out of town, after he has been released from jail, and there is not shown to have been any demand by the officer for reward or ransom, or any knowledge on the part of the officer that there was any demand for ransom or reward, does such act, if it occurred, constitute a violation of the Lindberg Kidnaping Act which forbids seizure for "reward or ransom"?

4. Where one does not seize, kidnap and carry away a person for ransom, reward or otherwise, but to eject an undesirable person from the community, does such act constitute kidnaping, in violation of Section 408a, 47 Stats., Section 326 as amended, 48 Stats. Section 781?

5. Where hearsay evidence has been admitted which related to acts and transactions occurring outside the presence of the accused, does such hearsay evidence prejudice the accused so that he is denied a fair trial guaranteed by the Fifth Amendment to the Constitution of the United States, and does such erroneous admission of hearsay evidence require a reversal of the judgment?

**Reasons Relied Upon for Allowance of the Writ.**

It is believed that the writ should be granted in this case for the following reasons:

I.

The questions presented in this case are fairly novel and have never been passed upon by this Honorable Court.

They present questions of substance which should be determined.

The question as to what is substantial evidence and whether the testimony of the admitted gambler Yamatoda that someone else told him, "This is Mexico," is sufficiently substantial to establish transportation in international or foreign commerce, has not been passed upon by this Court. The quantum of proof necessary to convict on so serious a charge as kidnaping is involved in this appeal.

II.

The question of inconsistent verdicts has never been passed upon in a case where the verdict of the jury is so inconsistent with the state of facts on another count in which there was a disagreement, as to be void for repugnancy, especially where the verdict could not be true if the charge of conspiracy was not true.

III.

This Court has never passed upon the issue, in a kidnaping case, as to whether a person who is ejected from a community and not held for ransom, or reward, or otherwise, constitutes kidnaping within the meaning of the Act, which forbids kidnaping "for ransom or reward or otherwise," especially where it involves a police officer who was acting under the orders of a superior, which superior officer although tried in the case, was not convicted and whose case was dismissed.

IV.

The case also presents the issue as to whether a defendant who is tried along with other defendants who are charged with a conspiracy, and where much evidence of conspiracy is introduced, is so prejudiced by the hearsay testimony

thus presented as to be denied a fair trial guaranteed by the Fifth Amendment to the United States Constitution.

Each of these questions is of special importance in the administration of criminal law. The opinion of the Circuit Court, while graphically delineating the facts in the case, we believe incorrectly decides the issues presented, or omits to decide them, and as to the appellant Mateus, presents practically no argument whatsoever to sustain his conviction.

**Prayer.**

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Ninth Circuit Court of Appeals be reviewed so that the judgment in this case may be reversed, and that petitioner be granted such other and further relief as may be proper.

MORRIS LAVINE,
*Attorney for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 194

---

ROUL MATEUS,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

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*To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices thereof:*

## ARGUMENT.

### I.

**The Circuit Court erred in holding that there was substantial and competent evidence to sustain the charge that Roul Mateus transported Yamatoda in foreign commerce from the United States into Mexico, and erred in upholding the United States District Court's denial of a directed verdict of acquittal as to petitioner Roul Mateus. The conviction rests upon pure speculation and conjecture.**

Yamatoda, the alleged victim of the kidnaping, was a professional Japanese gambler, once tried in Los Angeles

for murder (R. 452) and head of a gambling syndicate (R. 38), who claims he was kidnaped by rival Japanese gamblers and transported in foreign commerce.

Yamatoda, it appears, was the boss of a Japanese social or gambling club in "Little Tokio," Los Angeles, and he owned a film exchange business sometimes called the "Japanese Film Exchange" (R. 305, *et seq.*).

Yamatoda was arrested in Los Angeles by police officers on a warrant issued by the Justice Court in El Centro, and he was transported by automobile from Los Angeles to Indio, California, thence to El Centro (although he did not know it was El Centro, R. 313), where he was imprisoned in the County Jail and later in the City Jail of that city for some hours.

He said he was placed in the turtleback of an automobile and driven to some point where he got out of the automobile and walked until he got to a place which he discovered later was the Mexican police station.

(Mateus's name did not enter into the case until after Yamatoda got to El Centro.)

(We think the Court may take judicial notice that the international boundary line runs between Calexico in the United States, a city 12 miles from El Centro, and Mexicali, a city in Mexico, and that a street of Calexico continues across the boundary line and becomes a continuing street, or highway in Mexicali, Mexico. This street is bordered on each side of the international boundary line with many buildings of a similar appearance.)

The fantastic story in this case begins with the testimony of Government Narcotic Agent John J. Orth regarding conversations in New York City in the summer of 1937, Yuge and Tagawa being present, but the petitioner Roul Mateus being unknown anywhere in the case. Orth was told in New York by Tagawa that Yamatoda was respon-

sible for incoming drugs, importing Japanese actresses, and Japanese gambling (R. 37-43).

In September of 1938 there appears to have been a meeting in the Los Angeles Biltmore Hotel, with Orth, Major Manning and Inspector Gillenhammer of the Federal Narcotic Bureau, Yuge, Ota, Sonoda, Ugawa, Tagawa and his brother Tokio all being present. Orth was informed that Yamatoda was under arrest for the murder of Oku but that if Yamatoda beats the "murder rap" he would sell narcotics directly to the agent (R. 40).

(The petitioner Mateus had no part or knowledge of this meeting.)

Tagawa said he had obtained Yamatoda's arrest in San Francisco, and that he could help the officers in their investigation of Yamatoda for suspected violations of the narcotic law, and he suggested that perhaps he could take over the Tokio Club in Los Angeles and thereby better assist the officers.

Thereafter Orth kept more or less in touch with Yuge, Ota, Sonoda, Ugawa and Tagawa until October 12, 1938, on which date he went to the apartment house wherein these men lived and there talked with Yuge, Sonoda and defendant Henry, a Los Angeles police officer (R. 40-43).

Mateus was still unknown in the picture.

On September 25, 1938, Yamatoda went to the Tokio Club on East First Street in Japanese Town, Los Angeles, and there he told Tagawa that he understood Tagawa wanted to talk to him. About half an hour later Yamatoda left the club with a friend to walk to the film exchange a block away, and suddenly he observed Police Officer Henry, gun in hand, and with Police Officer Dixon and some white men and Ota, Sonoda and Tagawa, running across the street toward them. The officers handcuffed Yamatoda and some others and took them to the city jail. Thereafter the police, with Ota, Sonoda and Tagawa went to the Tokio Club,

taking Yamatoda and his friends Nomura and Nakada with them, but found the doors locked (R. 305, *et seq.*)

The next day Yuge, Ota, Sonoda and Tokio Tagawa went to the film exchange where employees of Yamatoda told them officers were coming and that they had better go. Officers Henry and Dixon entered, talked with the employees and left in Henry's car with Ota, Sonoda and Tokio Tagawa.

(Mateus, El Centro police officer, is still nowhere in the picture.)

Three months elapsed and the melodramatic scene shifted to El Centro, the county seat of Imperial County, 12 miles from the Mexican border and about 200 miles from Los Angeles. On December 21, 1938, Oswalt, at the time Chief of Police of El Centro, was given a warrant by a Justice of the Peace of El Centro, charging Yamatoda with a gambling offense. The warrant was sworn to by Yoshida and regularly issued by the Justice of the Peace. There is evidence in the record that Yoshida said he wanted to put Yamatoda behind the bars because Yamatoda had tried to put him there.

Upon issuance of the warrant for Yamatoda's arrest for gambling, Chief of Police Oswalt, with Deputy Sheriff Crousen, started by automobile from El Centro, picked up two Japanese near El Centro whom Chief Oswalt said would help locate Yamatoda, and the party drove to Los Angeles.

(It will again be noted that Mateus was not in the picture and the record is silent as to him.)

The next day in Los Angeles the El Centro officers met Officers Henry and Dixon at the Los Angeles city jail. That evening Chief of Police Oswalt told Deputy Sheriff Crousen of the El Centro sheriff's office that Yamatoda had been located. Later Oswalt, Officers Henry and Dixon went to Yamatoda's home where they served the El Centro warrant of arrest upon Yamatoda. Yamatoda and a white prisoner

were handcuffed together and put in the back seat of an automobile. Officer Henry was in the driver's seat and Chief of Police Oswalt and Deputy Sheriff Crousen were in the front seat with him as they drove to Pomona, a city about 30 miles from Los Angeles (Yamatoda didn't know it was Pomona, R. 310), toward El Centro. At Pomona Police Officer Henry joined Police Officer Dixon in another car that had followed from Los Angeles. The car stopped for an hour. Yamatoda didn't know where he was (R. 311). The car of Chief of Police Oswalt then was driven on to Indio, California, half way between El Centro and Los Angeles, with its remaining passengers. Before the party arrived in Indio Yamatoda says he asked to be let loose but that Chief of Police Oswalt accused Yamatoda of double-crossing him and said, "I can put you in jail or I can throw you out in the desert."

At Indio, California, the Oswalt party was met by Yuge, Yoshida with his employee Arriola, and another police officer of El Centro. Oswalt had telephoned Yoshida in El Centro to meet him in Indio. After the meeting Yuge, Yoshida, Yamatoda and Oswalt started for El Centro in Yoshida's car and the others came on later in Oswalt's car after some repairs had been made to it. Ota and Ugawa were waiting at the El Centro Tokio Club when Oswalt and the party arrived early in the morning.

(It is conspicuous that the name of Mateus is totally absent.)

There was much conversation there, in which Yamatoda said Yuge made the following demand upon him: "You do as we order you and give us all of your right and interest in the Great Fujii Theatre and the Film Exchange, and the Cogya Gaisha and the Club in Los Angeles and also $20,000 in cash." This, of course, is denied by the defendants, and particularly by Yuge.

(It will still be noted that Mateus' name nowhere appears in the scene.)

Yamatoda also said his life was threatened.

There is testimony that Oswalt was asleep most of the time the party was at the Club that morning, but later in the morning Oswalt, with Yoshida, took Yamatoda to the jail in El Centro. Yamatoda stayed in jail until around 4:30 p. m. that day, at which time he was released and some five or six Japanese escorted him out of jail.

Yamatoda said that Asanuma was between the front door and the inside door of the jail when Yamatoda was bailed out, and Asanuma took hold of Yamatoda by the left arm as they went out the front door and pushed him into an automobile occupied by Ota, Sonoda, Yoshida and Ugawa. Again Yamatoda said threats of violence were made against him, Asanuma saying, "If you fight we will kill you. This is the last time you are in the United States."

(It will be noted that Mateus's name is still nowhere in the picture.)

Yamatoda said the party drove around El Centro but when the automobile stopped at a boulevard crossing he forcibly broke away, jumped from the car, fell, got up and ran into a gas station, where he tried to telephone. He said there was quite a disturbance over this event, in which some of the party said Yamatoda was crazy. A policeman arrested Yamatoda and Ota and took them to the police station. Yamatoda said a belt containing $2,500 was taken from his person but was returned to him intact before his release, around 1:30 the next morning. Yamatoda was brought into a large room with others at the police station at the time of his release.

Yamatoda said he went out of the jail handcuffed and that he was taken to the rear of a yellow coupe and Chief of Police Oswalt told him to get in with Officer Mateus, and that he was pushed in.

(*It should be noted that this is the first appearance or mention of the name of Officer Mateus in the case.*)

Yamatoda said Officer Keating of the El Centro Police Department was at the wheel of the coupe. Yuge, Ota, Sonoda and Yoshida were present on the sidewalk.

The details of the case are highly conflicting and evidence is very unsatisfactory. The story told by Yamatoda is that a coupe driven by Keating (whom he didn't know was Keating until someone pointed him out, R. 325), with Mateus and Yamatoda in the front seat, moved away from the jail house. Yamatoda said he grabbed the wheel, attempting to cause a collision with a passing car, but did not succeed, and that Officer Mateus pulled him by the neck. He said that this automobile was following another automobile and the two cars presently stopped close together. Yuge, Ota, Sonoda, Yoshida and Oswalt, he said, got out of one car. Chief Oswalt, Yamatoda said, again threatened him and pulled him out of the car and removed the handcuffs saying, "This is your last chance. Do you want to go to Mexico or die." Yamatoda said, "No, I don't want to go to Mexico." Yamatoda testified, though Mateus denied it (in fact Mateus denies he was in the party at all), that the latter opened the turtleback and Chief Oswalt said "Get in." Yamatoda got in and Sonoda, at Oswalt's command, got in with him. Yamatoda said the turtleback cover was then let down and someone in the party commanded silence upon pain of being shot.

The coupe, Yamatoda said, was again driven for 15 or 20 minutes and was brought to a stop where the turtleback was again opened. Yamatoda said that Mateus said "Get out. If you holler I will shoot." Yamatoda said that Mateus then gave some tape to Sonoda and said "Put this tape on his eyes and mouth." Yamatoda claimed he said "Shoot if you are going to." Sonoda, he said, said "He

says shoot, go ahead shoot." Then, according to Yamatoda, Mateus searched him and said "Get in and if you holler I will shoot. I can shoot you from the front seat of the coupe." Yamatoda said he was put back in the turtleback but was not taped. He said the car went on for five minutes and stopped. There was a conversation in Spanish and the car went on. Yamatoda said he yelled to Sonoda and Sonoda said "If you holler you will be shot from above, so shut up." Five minutes later Yamatoda said the car again stopped, and Mateus, gun in hand, opened the turtleback, searched Yamatoda, took his money, and Sonoda said "This is Mexico." (There is no evidence that it was Mexico.) Yamatoda said that Mateus, in the presence of Sonoda and Keating, ordered him to move on or he would shoot him. He said he ran but stopped and asked for a $500 bill, and he said Mateus refused but did give him a bill of a smaller value. Yamatoda said he climbed a fence and around two o'clock walked into a garage. He said he saw Sonoda in a Mexicali, Mexico, hotel bedroom about three o'clock in the morning.

Yamatoda, when taken before the Mexican Immigration Officers gave a statement which he signed, that he came into Mexico alone and that he walked across the border.

Yamatoda admitted on cross-examination that the first time he saw Mr. Mateus after he came back from Mexico was in the Federal Building, just before this trial commenced and many months after the occurrence. He said (R. 450 et seq.), "It was before this trial commenced. Somewhere upstairs I don't know which floor it was. I think there were G-men at the time I saw Mr. Mateus there. I don't know whether anyone told me who was Mr. Mateus but after that I saw Mr. Mateus many times in this building and I heard from people that that was Mr. Mateus. I was in the hall and I heard that from many people. I don't remember just who it was. However, I also saw the picture

of Mr. Mateus in a newspaper—not the picture—but the name of Mr. Mateus in the newspapers. I don't remember whether I was told by the G-men that Mr. Mateus was a special police officer. The first time I learned the name Mateus clearly was after I came back to Los Angeles. I read the name Mateus in the newspapers and I also heard from many people in the hall of this building that that is the man Mateus. After I read Mr. Mateus' name in the newspapers I did not tell anybody that that was the man who had driven me across the line. I think I said upstairs 'That is the man who drove me across the line.' I think I stated that after I had seen Mr. Mateus upstairs. I don't remember whether at that time I knew Mr. Mateus' name or was told his name. I think I heard that he was a special officer. I think I was told on that occasion that I would be shown the man who took me across the line although I am not absolutely sure. I was not shown any other Mexican person at that time. I have never been advised by anyone prior to taking the witness stand in this case that unless the defendants, or some of them were convicted in this case, that I was liable to deportation. I have been told that any immigration proceeding against me was closed. I heard that it was closed permanently. I believe so. I do not believe that any such case is any longer pending against me. I never had any man go to Washington, D. C., to bring charges of a kidnapping. I only requested him to take charge of the immigration matters for me. At that time I was asked how I went to Mexico and I explained to him how I did, how I was taken to Mexico. At the time I was taken to El Centro I knew there was one charge pending against me in the Superior Court of Los Angeles County. I had already appeared in court at a preliminary investigation. I heard at that time something about attempted murder. I thought there was one charge against me. On either the 10th or 11th or 12th of January, 1938,

I saw a newspaper which was either the Los Angeles Times or Examiner at the home of the Japanese Consul and after I had seen that newspaper, I did my best, spending a lot of money, in order that I might come back to the States. I learned from that newspaper at that time that I was charged with murder in Los Angeles County. I believe that I was kidnapped by Mexican officials and taken to Mazatlan.

"Q. Were you taken to Mazatlan, Mr. Yamatoda?

"A. I think so, and I so believe.

"By Mr. Hervey: Where do you believe you were kidnapped from?

"Mr. Silverstein: Objected to as being incompetent and opening up a collateral issue here again.

"The Court: The objection is sustained. He has also stated he believed he was kidnapped. Now the details of it can't possibly serve any useful purpose in this lawsuit, as I see it.

"Mr. Hervey: Unless, your Honor, he was kidnapped, for example, from jail by the officials who had him in custody, or was kidnapped from the home of the Japanese Consul where he was staying, and, apparently, would have had protection. If he was kidnapped from the jail, it will tend to show what basis there was for feeling he was kidnapped—if he was removed from a jail in which he was held in custody. If he was kidnapped from the Japanese consul's home, it is for the jury to determine whether he could have been kidnapped under such circumstances with one of his countrymen there with that much power in Mexico.

"The Court: Are you trying the suit of whether he was or was not kidnapped over in Mexico, or are we trying certain defendants on a charge contained in the indictment? What difference does it make? He says he believes he was kidnapped. Now you want to prove the truth or falsity of whether or not he was kidnapped.

"Mr. Hervey: I want to prove the reasonableness of his statement that he believes himself to have been

kidnapped by Mexican officials in order that the jury, by comparison, might determine——

"Mr. Shire (Interrupting): Just a moment, please. Counsel is not stating the answer.

"The Court: The objection will be sustained. I am not going to permit counsel to range all over the territory.

"Mr. Hervey: Might an exception be noted?

"The Court: An exception.

"Q. Do you believe that through the instigation of Chief of Police Oswalt, either alone or with other defendants in this case, a group of Mexican officials were induced and procured to kidnap you and take you to Mazatlan?

"A. As to that question I am half and half. I half believe that and half dis-believe that.

"Q. Do you believe that the Japanese Consul was prejudiced against you by any act of Mr. Oswalt?

"A. I do not believe that the Japanese Consul was prejudiced against me.

"Q. Were you brought into the United States out of Mexico from Mazatlan by Mr. Martin, a Los Angeles County officer under a warrant charging you with the murder of a man by the name of Namba? Did you believe that you were?

"A. No, no I don't believe so. I believe that I came from El Centro in the United States into Mexico and back to the United States on my own accord.

"Q. Did you expend any money in an endeavor to come back to the United States before you learned that there was a murder charge pending against you here?

"A. No, I did not expend much money before that.

"Q. Were you more anxious to return to the United States after learning that you had been charged with a murder in Los Angeles County than you were before having learned that?

"A. Yes, I was."

Mateus denied that he ever saw or knew Yamatoda (R. 768, 769). He said that he did not know Yamatoda until

after the trial started; that he never had any business dealings with any of the Japanese defendants and didn't know much about them. He was not cross-examined by the Government (R. 768, 769).

It will be noted from the statement of facts which is set forth herein that Mateus had no knowledge of any of the acts or transactions prior to December 24, 1938.

The testimony of all the previous events was, therefore, highly prejudicial to this petitioner.

This Court can take judicial knowledge of the fact that El Centro is the county seat of the county which borders on the international boundary line and that even though Yamatoda was driven to the border there would be no transportation in foreign commerce.

Yamatoda told a very melodramatic and inherently improbable story about his ride in the automobile, and he never did know whether he was in or out of the United States, nor did he know whether he had stopped at Pomona, California (R. 310), nor did he know when he was in El Centro that it was El Centro (R. 313).

**There is no substantial and competent evidence to sustain the charge that Roul Mateus transported Yamatoda from the United States into Mexico. The Trial Court therefore erred in not granting the motion for a directed verdict of acquittal as to the appellant Mateus.**

The indictment in this case charges the appellant, who was a police officer, with transporting Hideichi Yamatoda in *foreign commerce,* that is to say, the indictment charges in Count I that the defendant transported Yamatoda from the City of Los Angeles to Mexico, in violation of Section 408a, Title 18, United States Code Annotated. There is no evidence that Mateus ever transported Yamatoda from Los Angeles.

Unless it is shown by substantial and competent evidence that Mateus transported Yamatoda across the international line into Mexico, the evidence is insufficient to sustain the verdict as to this count.

It will be noted that the appellant was convicted of the first count only, the jury disagreeing on the second or conspiracy count.

The case of kidnaping in foreign commerce against Mateus rests entirely on the testimony of Yamatoda, who described his alleged kidnaping experiences as having started in Los Angeles (before he ever knew or heard of Mateus). After Yamatoda had been released from the jail in El Centro, he testified:

> "As I came out of the jail walking on the sidewalk I saw in a car first Mr. Ota and Mr. Yoshida. When I arrived at the car four Japanese came out of that car. They were Mr. Yagawa, Mr. Yoshida, Mr. Ota and Mr. Yuge. Mr. Asanuma pushed me in the back and at the same time Mr. Ota held me on my right arm and then they put me inside of a car." (R. 318.)

The witness then said he asked for milk to drink, and the Japanese told him, "We are taking you to Mexico."

It will be noted that *Mateus was not present at this conversation,* and the record does not show that Mateus had any knowledge of it.

Later on the witness said that they reached a gasoline station and he offered someone $500 to take him to Los Angeles. (R. 319, 320.)

He said he left the city jail in company with Mr. Oswalt—he did not notice anyone else—and went to the police station (R. 321). After some conversation about discharging his lawyer Mr. Oswalt got angry with Yamatoda and said, in essence, "Go to hell," and further said to Mr. Ota and Mr. Yuge, "Throw him in the desert," and Oswalt went out (R. 323).

After Oswalt left the room, Ota said, "This is your last chance. If you do not listen we will take you to Mexico and to the desert and throw you."

The witness said: "To the best of my recollection Chief Oswalt, Mr. Ota, Mr. Yuge, Mr. Yoshida, *I believe,* and that gentleman *over there,* Mateus at the front entrance, and a short policeman and an elderly policeman with glasses on who gave me the money, were out near the counter near the entrance" (R. 323).

The witness later said he got in in front of the coupe. Mr. Mateus was standing at the door, holding the door open, and he "pushing me inside of the car. A man who was tall, over six feet, got inside of the car with me and he took the wheel of the car and Mr. Mateus got inside of the car. At that time I did not know the name of the man who was holding the wheel of the car, but I heard later, and his name was Mr. Keating" (R. 325). "After the car started, it continued to drive about ten minutes when I saw another car coming from the other side of the road."

The witness said he tried to make an escape. He said after traveling about half a mile the car he was in turned to the left. He was still in the United States, for he said, "Mr. Oswalt said to me 'This is your last chance. Do you want to go to Mexico and die?' " (R. 326.) There was a question as to whether he said "and die" or "or die." (R. 327.) Yamatoda said he didn't want to go to Mexico.

The witness said he was put in the turtleback part of the automobile. Someone was holding a gun, but he didn't know who it was, and Mr. Oswalt said to him, "Get inside of this," and Oswalt also told Sonoda to get in. The witness then said:

> "Then the cover was shut. Sonoda and myself, both of us, were in the rear of this turtleback of the coupe lying down. The car started and after fifteen or twenty minutes stopped again. That place was like a ranch

> or in the midst of a ranch. There was open country. There were no houses around. Then the turtleback was opened. Mateus holding a gun in his left hand said to me 'Get up'. To the best of my recollection he said in essence, 'If you holler I will shoot'." (R. 328.)

After the car had stopped again the witness did not know whether Mateus was there or not, nor did he know where he got out of the car. He said the car started again and stopped again after four or five minutes. He saw lights, blue, red, white lights (R. 330). Regarding these lights he saw, the witness testified as follows:

> "Mr. Shire: Q. You were in the turtle back of this car, and did you see these lights through this portion in back of the back seat? Is that what you mean?
> A. I suppose it is so.
> "Q. Well do you know?
> "A. I do not know for sure, but it was just above my head as I looked up" (R. 330).

The witness testified:

> "After Mr. Sonoda put the money in my pocket, he said 'That is a power house. Nobody is there,' and he ran toward the direction which I thought was West. I did not see Mateus or Keating that time but I did not follow Sonoda. I did not see any other people in the street. I ran to a house on the other side of the street where there was a light. I knocked at the second of two doors to the house. A woman yelled in a loud voice, in what I thought was Spanish. After I talked to this lady in the house I crossed the street and walked toward a lighted house." (R. p. 333.)

The examination of Yamatoda did not establish that he had been *transported across international lines* or that Mateus had transported him across international lines. He admits stating that he did not know where he was, whether

it was the United States or Mexico, and there was no competent and sufficient proof that he was actually transported across international lines. In fact Yamatoda did not know when he was in Pomona, California, or El Centro, California.

The respondent in its brief points to nothing in the evidence which shows that Mateus transported Yamatoda across international lines, or that Yamatoda ever was actually transported across international lines, or that Yamatoda or anyone else actually knew they were transported across international lines.

On cross-examination Yamatoda testified:

> "Q. Is it a fact that you were visiting in Mexico?
> "A. It is not a fact. I was taken in a car, and was delivered in Mexico. *At that time, I heard for the first time from Mr. Sonoda that it was Mexico.*" (Italics added.) (R. p. 447.)

He further testified that after he came back from Mexico he saw Mateus for the first time in the Federal Building, although he was not absolutely sure. He said he didn't know for sure whether somebody pointed Mr. Mateus out or not, but he saw the pictures of Mateus in the newspaper. The first time he learned the name Mateus clearly was after he came back to Los Angeles (R. p. 450), and also saw his picture in the paper and read about him. After he read Mr. Mateus' name in the newspapers he did not tell anybody that that was the man who had driven him across the line. He stated that after he had seen Mateus upstairs, "I think I was told on that occasion that I had been shown the man who took me across the line, although I am not absolutely sure." (R. p. 451.)

This Court may take judicial knowledge of Calexico and Mexicali and the short distance between each, and that if Yamatoda got out of his car and walked as he described

until he reached a Mexican police station, he could still have been in the United States. His walk would have had to start in the United States.

In any event, the evidence is more consistent with innocence than as to guilt on the point of his still having been in the United States, and any conclusion either way would be a conjecture. Conjecture is not substantial evidence.

This evidence is fortified by Yamatoda's own affidavit which was admitted in evidence in the case before the Department of Immigration in Mexico, wherein Yamatoda said:

> "Q. When did you enter Mexico?
>
> "A. I discovered that I was in Mexico when I presented myself at the local police station. I did not know that it was the police station.
>
> "Q. What day was that?
>
> "A. Early in the morning of the 24th (December 24).
>
> "Q. In what condition did you enter the country, and how?
>
> "A. That while visiting in the City of Calexico, he took a street—which he doesn't remember; and continued walking until he noticed by the names on the business establishments that he was in a place which was not the United States; and then he went toward a building where there was a light—apparently it was open; and he stepped in to inquire as to where he was; with the result that he found the place was the police station. He was detained and referred to this office. (Immigration)." (R. 369.)

This was Yamatoda's statement before the inspector of the Department of Sanitation in Mexico.

While the witness attempts to explain his reasons for giving this statement to the Mexican immigration officers, and does not deny that he made this statement, this fact alone shows that Yamatoda did not actually know at any time that he was in Mexico.

If his statement in Mexico was false, as he claimed in the trial of this action, then it necessarily goes to show that any testimony he gave was entirely unsubstantial.

What is substantial evidence?

It has been defined as competent evidence. (*Mississippi Valley Trust Co.* v. *Begley,* 275 S. W. 540.) Certainly the evidence here was not competent to establish that he had been transported into Mexico. His own testimony is lacking in that definite proof that he was ever transported from the United States into Mexico, or that he ever knew that he had crossed the international line before he started walking. His statement that Sonoda told him "This is Mexico" shows that he did not know except from the statement which he says Sonoda told him that he was in Mexico. Sonoda denies this.

This was, at the most, uncorroborated hearsay, which does not constitute substantial evidence as against Mateus, who was not even present. (*New York State Labor Relations Board* v. *Frank G. Shattuck Co.,* 20 N. Y. S. (2d) 949, 951; *Union Drawn Steel Co.* v. *National Labor Relations Board,* 109 Fed. (2d) 587, 592.)

It was the duty of the government to prove beyond a reasonable doubt that the defendant was actually transported into Mexico in foreign commerce. This burden the government did not meet. It only showed that all Yamatoda knew was what Sonoda had told him, and that he was walking in a certain direction when he came to a police station in Mexico, which is not far from the border of the United States. As stated in *Edwards* v. *United States,* 7 Fed. (2d) 355, 360:

> "If the evidence, taken as a whole, is as consistent with innocence as with guilt, then the conviction should not be sustained. In Wright *v.* United States, 227 F. 855, 857, 142 C. C. A. 379, 381, speaking of the defendant, this court said: 'The legal presumption was that he

was innocent of that crime until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' See, also, Wiener et al. *v.* United States (C. C. A.) 282 F. 799; Turinetti *v.* United States (C. C. A.) 2 F. (2d) 15."

And as stated in *Wright* v. *United States*, 227 Fed. 855, 857:

"Conceding the truth of this testimony for the government, it discloses no act or word of Wright tending to show that he introduced or caused the introduction of the liquor from Arkansas into Oklahoma. The legal presumption was that he was innocent of that crime until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. Union Pacific Coal Co. *v.* United States, 173 Fed. 737, 740, 97 C. C. A. 578, 581; Vernon *v.* United States, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550; United States *v.* Richards, (D. C.) 149 Fed. 443, 454; Hayes *v.* United States, 169 Fed. 101, 103, 94 C. C. A. 449, 451; United States *v.* Hart

(D. C.) 78 Fed. 868, 873; Hart *v.* United States, 84 Fed. 799, 28 C. C. A. 612; United States *v.* McKenzie (D. C.) 35 Fed. 826, 827, 828; People *v.* Ward, 105 Cal. 335, 341, 38 Pac. 945; People *v.* Murray, 41 Cal. 66, 67; State *v.* Hunter, 50 Kan. 302, 32 Pac. 37; Bradshaw *v.* State, 17 Neb. 147, 22 N. W. 361, 366."

It is also stated in *Neal* v. *United States,* 102 Fed. (2d) 643, 648:

> "* * * and when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a conviction. Fulbright *v.* United States, 8 Cir. 91 F. (2d) 210; Haning *v.* United States, 8 Cir. 21 F. (2d) 508; Wright *v.* United States, 8 Cir. 227 F. 855."

Examining the evidence in this case in the light of these cases, the government's evidence is as consistent with the fact that Yamatoda was not transported in foreign commerce as it is with the belief or conjectured that he was so transported, and in view of that fact it necessarily follows that the judgment of conviction should be reversed.

Here there was no substantial basis of fact of any kind which Yamatoda had to show that he had ever been driven across international lines, or that Mateus had participated therein. We have taken so far Yamatoda's own statement which shows that it lacked the character of substantiality in so far as it showed any transportation in foreign commerce, and upon that we predicate the lack of its substantiality.

Mateus took the witness stand and denied that he had ever seen Yamatoda before he came into the courtroom. He denied that he ever drove Yamatoda across the border. He denied that he was in the El Centro police station on the morning of December 24th, 1938, when Yamatoda was released from custody. He stated he never had any business dealings with Japanese involved (R. pp. 768, 769).

He was not even cross-examined by the government. It was not shown that he had any interest in the case or knew the parties involved or had any concern about the outcome.

Viewing the case in the light most favorable to the government it cannot be said that there is any substantial evidence to show that Mateus kidnaped and transported Yamatoda into Mexico. It is not shown that Yamatoda ever actually knew of his own knowledge that he was in Mexico, and this goes to the very jurisdiction of the charge itself.

Where a witness gives testimony as to facts which he could not have known of his own knowledge, such evidence is not substantial. (*In re Silvers Estate*, 98 Mont. 141, 38 Pac. (2d) 277.)

The term "substantial" includes the terms "credible" and "trustworthy." In *Perry* v. *Paladini, Inc.*, 89 Cal. App. 275, 284, 285, it is said:

> "The doctrine thus announced clearly is to the effect that the prima facie case made will stand in the absence of substantial proof to the contrary. And, as a mere matter of expression the term 'substantial' includes the terms 'credible' and 'trustworthy'."

Can anyone say that the racketeer Yamatoda's testimony is "credible" and "trustworthy" and hence substantial to the point where it incarcerates an American police officer in the light of Yamatoda's motive and his uncertain testimony in this case?

II.

**There is no substantial and competent evidence that Roul Mateus was present on the alleged kidnaping trip. The Trial Court therefore erred in not granting the motion for a directed verdict of acquittal as to the appellant Mateus.**

Searching the entire record, there is no evidence that Mateus was present on the alleged kidnaping trip.

Yamatoda at no time was certain that he was in the automobile. He says that a man who was tall, "over six feet," got inside the car with him and "took the wheel of the car," (he thought it was Keating, but Keating denies it) and "Mateus got inside of the car at that time. I do not know the name of the man who was holding the wheel of the car, but I heard later that his name was Mr. Keating" (R. p. 325).

At no time thereafter does Yamatoda place Mateus in the car with any certainty. Who was present, who was driving the car, is not shown by the evidence.

Keating, who was a witness, testified that he did not ride in an automobile with Mateus or Yamatoda, or either of them, and that he did not drive to a place which had the general appearance of being a ranch, and in the presence of Mateus, see Oswalt or anyone else get out of an automobile and come back to a car he was in (R. p. 583). He says he did not see Yamatoda get into a yellow coupe that night. He says he did not ever ride in an automobile in which Yamatoda was riding, nor did he ever ride with Roul Mateus or Yamatoda in an automobile driven by him or Mateus, or anyone else (R. pp. 582, 583). He says he did not drive into Mexico with Yamatoda (R. p. 584).

Keating says his car was gunmetal at the time. He says his car has been painted since them (R. p. 594).

By his own standard which he applies to his knowledge of Keating, he could not know who the man was who "got inside of the car at that time,"—the time that the tall man did.

The best and only plausible reason which Yamatoda gave for saying that he knew who Mateus was, is that people told him the man he saw in the Federal Building was Mateus.

The evidence given by the Government's witness as to

Mateus being on the kidnaping trip is therefore lacking in substantiality.

The burden of proof was upon the Government to show that Mateus took Yamatoda on the kidnaping trip. Yamatoda's own testimony is so lacking in definite character as to fail to overcome the presumption of innocence with which he is clothed.

The defendant was therefore entitled to a directed verdict.

III.

**Where the accused was a police officer of a city in a border county and is not shown to have had any knowledge of the acts, transactions or occurrences in an alleged conspiracy to kidnap the verdict of the jury finding him guilty of kidnaping and disagreeing as to the conspiracy is inconsistent and void, especially where the facts were such that the accused could not be guilty of kidnaping unless he was guilty of conspiracy to kidnap.**

The verdict as to Roul Mateus is inconsistent, and therefore void. The Circuit Court's opinion points out with reference to Roul Mateus that he was found guilty on Count I and there was a disagreement on Count II.

Count I charged the substantive offense of kidnaping. Count II charged conspiracy to kidnap in foreign commerce. The verdict of the jury found the defendant guilty of the substantive offense of kidnaping, but disagreed on the conspiracy charge.

In the case of *Sasser* v. *United States*, 29 Fed. (2d) 76, 78, it is pointed out that an inconsistent verdict is one that is contradictory or legally incorrect, as where, on a charge of conspiracy one of two defendants is convicted and the other is acquitted. A verdict is not inconsistent that is consistent with itself. Conversely, however, a verdict that is inconsistent with itself is inconsistent.

Is a verdict consistent with itself when the jury brings in a guilty verdict on the offense itself, whereas it disagrees as to the conspiracy to commit that offense?

Under the facts of this particular case it would have been impossible for Mateus to have committed the substantive offense unless he had conspired with the others to commit it. Where in the evidence is there any showing that Mateus had knowingly transported or caused to be transported in interstate or foreign commerce for ransom or reward, as charged in the Government's theory of the case?

It was the position of the Government that the Japanese who were involved were motivated in their plot to kidnap another Japanese named Yamatoda by their desire "to obtain control of Yamatoda's interest."

This Court further stated: "It was upon this theory that we held admissible the testimony relating to the conversations in September 1938. With this in mind it becomes evident that later conversations tending to prove that after the kidnaping the defendants did at least attempt to gain control of the film exchange—one of the fruits of the kidnaping plan—are admissible as further proof of the motive of the crime."

However, this does not in any way apply to Roul Mateus, El Centro police officer. He was not interested in gaining control of the film exchange, nor in receiving any money or ransom. As pointed out in the Court's opinion, his first appearance, or the first mention of his name in the case relates to December 24, 1938, when it is claimed that Mateus rode in the coupe along with Keating (who was not prosecuted).

The things that Mateus is alleged to have done could only be material in the event that he was guilty of a conspiracy. Since the jury disagreed on the issue of whether

he was guilty of a conspiracy, the verdict is necessarily inconsistent with the charge that he committed the offense itself.

The entire evidence of the Government showed that whatever Mateus did he did not do alone but in conjunction with other persons. It is not alleged that Mateus drove the car. The Government says that Keating drove the automobile. It is not alleged that Yamatoda was brought to the El Centro jail by Mateus, or that Mateus had anything to do with it. In fact it is the Government's position, and it was shown from the testimony of witnesses, that Oswalt, Chief of Police, had Yamatoda brought there. The jury also disagreed as to Oswalt in both counts. The Government's testimony was that Yamatoda was taken out of jail handcuffed. It is not alleged that Mateus took him out handcuffed, but that other persons did so. This Court points out that Yamatoda was taken to the rear of a yellow coupe and Oswalt told him to get in with Mateus and he was pushed in. The rest of the evidence pointed out by the Court related to Yuge, Ota, Sonoda, Yoshida and Oswalt. The part Mateus played, if any, could therefore only be as a co-conspirator, and in every instance a part secondary to other persons. All of the things that he is charged with having done would still be innocent unless he had guilty knowledge of what the others were doing, and thus would be a part of a conspiracy if that were true.

But since the jury said by its disagreement that Mateus was not a part of a conspiracy, the verdict finding him guilty of the acts themselves was entirely inconsistent and repugnant.

The case of *United States* v. *Socony Vacuum Oil Company,* 310 U. S. 247, cited by the Court, points out: "The theory of the charge to the jury was not that the defendants must be convicted, if at all, as a body; rather the issue of guilt was distributed."

In the case at bar the theory of the Government was that Mateus was guilty only if the others were guilty. Indeed its position could be none other. Mateus did not enter into the case until shortly before the alleged transportation. He therefore could be convicted, if at all, only if the others were convicted, and only on the theory of a conspiracy as applied to all defendants. The verdict was therefore inconsistent as to Mateus.

In civil cases where there is conflict between a special and general verdict the former will prevail. (*Lemke* v. *Chicago M. & St. P. R. Co.*, 39 Wis. 449; *People* v. *Piper*, 50 Mich. 390, 15 N. W. 523.)

In a civil case, if the inconsistency is between findings in a special verdict in respect to a controlling fact no judgment can be entered. As said by Chief Justice Ryan: "The verdict on a material point finds for each party, and against each party; being in effect, equivalent to disagreement of the jury. The answer assumes to cut a single and indivisible truth in two. * * * No judgment can rest on such a verdict, and no court should receive it."

(*Carroll* v. *Bohan*, 43 Wis. 218, 220; *Haas* v. *Chicago & N. W. R. Co.*, 41 Wis. 44, 51; *Davis* v. *Farmington*, 42 Wis. 425, 431; *German Ins. Co.* v. *Smelker*, 38 Kan. 285, 16 Pac. 735.)

Under the common law a jury may give a special verdict in a criminal case. (2 Hawk. P. C. 8th ed. chap. 47, sec. 3; 4 Bl. Com. pp. 360, 361; *Com.* v. *Call*, 21 Pick. 509, 514, 32 Am. Dec. 284; *Com.* v. *Eichelberger*, 119 Pa. 254, 263, 4 Am. St. Rep. 642, 13 Atl. 422, 7 Am. Crim. Rep. 324; *State* v. *Bray*, 89 N. C. 480; *People* v. *Piper*, 50 Mich. 390, 15 N. W. 523.)

No judgment may be entered upon an uncertain special verdict. (*People* v. *Olcott*, 2 Johns. Cas. 301, 311, 1 Am. Dec. 168.)

In criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction. (2 Bishop, New Crim. Proc. 2d ed., sec. 1015a (5).)

Where one by different counts is accused of two crimes which by reason of their nature cannot be committed by the same person, a verdict of guilty on both counts will be held so inconsistent with itself and so uncertain in law that no judgment can be entered thereon. Such verdicts are so meaningless as to be without force. (*Reg.* v. *Evans,* 7 Cox, C. C. 151, 157; *Rosenthal* v. *United States* (C. C. A. 9th), 276 Fed. 714; *Com.* v. *Haskins,* 128 Mass. 60; *Tobin* v. *People,* 104 Ill. 565, 4 Am. Crim. Rep. 555. And see *Com.* v. *Lowrey,* 158 Mass. 18, 20, 32 N. E. 940.)

In *Reg.* v. *Evans,* 7 Cox, C. C. 151, *supra,* one count accused the prisoner of stealing sheep. Another count charged him with having received them on the same day. There was a verdict amounting to a finding of guilty on each count. The Court of Queen's Bench held it inconsistent. The chief justice announcing the judgment said (p. 157):

> "This record must therefore be dealt with as if there had been a special verdict, on which the court should find matter which would not justify either an acquittal or conviction. The practice in such a case has been to award a venire de novo. The cases in Lord Raymond's reports, and the later cases, sanction such a course, and we cannot see any good grounds for distinguishing an uncertain general verdict, such as this, from an uncertain special verdict."

In *Rosenthal* v. *United States* (C. C. A. 9th), 276 Fed. 714, three were indicted under the Act of February 13, 1913, 37 Stat. at L. 670, chap. 50, U. S. C., Title 18, Sec. 409. One count accused them of having bought and received property that had been stolen from a car, then being a shipment in interstate commerce, knowing it to have been so stolen.

The second count charged that at the same time and place they had that property in their possession under like circumstances and with like knowledge.

On the first count the jury found all not guilty. On the other count all were acquitted but one and he was found guilty. The evidence showed that the property had been stolen and disclosed only one transaction between the thieves and the defendant who was found guilty. The court said (p. 715):

> "By its verdict upon the first count of the indictment the jury found that the plaintiff in error neither bought nor received the cigarettes from them (the thieves) with knowledge of the theft, and by its verdict upon the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting. For this reason we feel obliged to reverse the judgment and remand the case for a new trial."

Upon the indictment of several for an offense that could not be committed without the participation of two or more of them a verdict of guilty against one and of not guilty for the others is deemed wholly repugnant and invalid. (1 Chitty, Crim. Law, 5th Am. ed. p. 640.) On indictment of riot against three a verdict finding less than that number guilty is void for more than two must riot. (*Harrison* v. *Errington,* Popham, 202, 79 Eng. Reprint, 1292; *Rex* v. *Heaps,* 2 Salk. 593, 91 Eng. Reprint, 502; *Rex* v. *Sudbury,* 12 Mod. 262, 88 Eng. Reprint, 1309; *Rex* v. *Scott,* 3 Burr. 1262, 1264, 97 Eng. Reprint, 822.) And on a charge of conspiracy against two, a verdict convicting only one is void. (*United States* v. *Hamilton* (C. C.) 1 W. L. Bull. 27, Fed. Cas. No. 15,288; *Feder* v. *United States,* 5 A. L. R. 370, 168 C. C. A. 644, 257 Fed. 694, 696; *People* v. *Olcott,* 2 Johns. Cas. 310, 311, 1 Am. Dec. 168; *Reg.* v. *Manning,* L. R. 12

Q. B. Div. 241, 245; *Reg.* v. *Thompson,* 16 Q. B. 832, 844 et seq. 117 Eng. Reprint, 1100.) And on the trial together of persons accused as principal and accessory, acquittal of the former renders a verdict against the latter bad because entirely inconsistent with the innocence of the person charged as the principal offender. (2 Coke, Inst. 184; Foster, p. 360; 1 Hale, P. C. 1st Am. ed. p. 625; 2 Hawk P. C. chap. 29, sec. 47; *United States* v. *Crane,* (C. C.) 4 McLean, 317, 319, Fed. Cas. No. 14,888; *Com.* v. *Andrews,* 3 Mass. 126, 131.)

One accused in different counts of an indictment of the same crime, there being no difference in the means alleged to have been employed, may not be adjudged guilty on a verdict of conviction on one count and of acquittal on the other. (*Speiller* v. *United States,* (C. C. A. 3d) 31 F. (2d) 682, 684; *State* v. *Akers,* 278 Mo. 368, 370, 213 S. W. 424; *State* v. *Headrick,* 179 Mo. 300, 307, 78 S. W. 630; *Com.* v. *Edds,* 14 Gray, 406, 410; *United States* v. *Malone* (C. C.) 20 Blatchf, 137, 9 Fed. 897, 900.)

Where there is a verdict of not guilty on one count and a verdict of guilty on another and the former necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count, then in determining whether the evidence was sufficient to sustain the finding of guilt the court must exclude from consideration the fact so found in favor of the accused. (*John Hohenadel Brewing Co.* v. *United States* (C. C. A. 3d) 295 Fed. 489; *Peru* v. *United States* (C. C. A. 8th) 4 F. (2d) 882; *Murphy* v. *United States* (C. C. A. 8th) 18 F. (2d) 509; *Boyle* v. *United States* (C. C. A. 8th) 22 F. (2d) 547; *Kuck* v. *State,* 149 Ga. 191, 193, 99 S. E. 622. And see *Baldini* v. *United States* (C. C. A. 9th) 286 Fed. 133.)

Under an indictment by one count accusing eight persons of conspiracy to maintain a nuisance and alleging as

an overt act the maintenance of that nuisance and by another charging that they did knowingly maintain such nuisance, a verdict acquitting them of the conspiracy (i.e., the agreement to maintain) and convicting them of having knowingly maintained the identical nuisance specified in the conspiracy charge will not support a judgment of guilt. This for the reason that, by the verdict that all knowingly maintained the nuisance, the jury necessarily found that there was an agreement among them to maintain the nuisance. The court said: "It is unthinkable that eight men should for a period of time have knowingly maintained and operated the place where intoxicating liquor was sold and kept for sale, without some kind of an agreement among themselves." (*Boyle* v. *United States* (C. C. A. 8th) 22 F. (2d) 548.)

A brewing company indicted for violation of the National Prohibition Act was accused by the first count of unlawful manufacture at divers times between dates more than a year apart. By the five counts following it was accused of unlawful sales at different times; and, by the seventh count it was accused of nuisance during that period in that it maintained a place where liquor was manufactured, kept and bartered. The jury found defendant not guilty under the first six counts, and guilty of a nuisance under the seventh. The court held the facts alleged in the counts on which defendant was acquitted were to be deemed as nonexistent and excluded from consideration in determining whether there was evidence to sustain the nuisance charged. (*John Hohenadel Brewing Co.* v. *United States* (C. C. A. 3d) 295 Fed. 489.)

The contention that the verdict is inconsistent because Oswalt was not convicted on either count must also be considered. It must be remembered that Oswalt was the Chief of Police and Mateus was one of the police officers. The others convicted were all Japanese.

It is our position that since the jury disagreed as to Oswalt, as to both counts, the verdict was inconsistent and void, as to Mateus.

IV.

**The evidence is insufficient to establish guilty knowledge or transportation for ransom or reward or otherwise.**

Each and all of the things that Mateus is alleged to have done could only be in violation of the statute if he had knowledge of the purposes and objects of the alleged transportation in interstate commerce of the other persons in the case. No such guilty knowledge is shown.

Mateus is not shown to have had any knowledge, for instance, of the meeting with federal narcotic agent John J. Orth in New York City in the summer of 1937 with Yuge, Ugawa and Tagawa.

It is not shown that Mateus had any guilty knowledge of a meeting in September, 1938, at the Los Angeles Biltmore Hotel between various federal agents and various other defendants in the case.

In fact the evidence would lead to the positive inference that Mateus had no knowledge of these events or the subsequent events; that he knew nothing of the meetings in Los Angeles alleged to have occurred on October 12, 1938 between Orth and various defendants and a Los Angeles police officer. It is shown that Mateus was not present and had no guilty knowledge of the meeting on September 25, 1938 in Japanese Town, Los Angeles, at the Tokio Club.

It is clear that Mateus, three months later, had no guilty knowledge of the securing by Oswalt of the signature of Yoshida to an affidavit charging Yamatoda with a gambling offense.

Mateus had no knowledge of a meeting between officers Henry and Dickson at the Los Angeles City Jail with two Japanese, nor of any conversations which allegedly took

place between Oswalt and Yamatoda, nor of any conversations or threats which allegedly took place between Oswalt, the Chief of Police, Yamatoda and other persons, or of any trips made by them.

He had no knowledge of Asanuma saying, "If you fight we will kill you. This is the last time you are in the United States."

Mateus had no knowledge of any of these persons, or anyone else, driving around El Centro with Yamatoda.

It is not shown anywhere that Mateus had any knowledge, motives or purposes, or that he knew anything about Yamatoda.

It is therefore evident that unless Mateus is shown to have had guilty knowledge of what had preceded his entry into the picture that he could not have been guilty of wilfully and knowingly transporting Yamatoda in interstate commerce.

If we concede, solely for the sake of argument, that Mateus did all of the things which the Government presented through the lips of Yamatoda, it still would not be kidnaping within the meaning of the statute in view of the failure of proof that the transportation was *knowingly* done by Mateus *for ransom* or *reward* or otherwise.

The statute provides a penalty for kidnaping of persons "held for ransom or reward or otherwise."[1]

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[1] "Sec. 408a. *Kidnaped persons; transportation, etc., of persons unlawfully detained.* Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court, if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply or be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: *Provided*, that the failure to release such person within seven days after he shall have been unlawfully

The word "ransom" is defined as follows:

> "To redeem from captivity, slavery, punishment or the like by paying a price; to buy out of bondage, etc., as to ransom prisoners of war." (Webster's New International Dictionary.)

The word "reward" is defined as follows:

> "To make a return or give a reward, * * * a sum of money for the return of something lost or for the capture of a criminal, etc.; recompense; * * *
>
> "Law. Compensation or remuneration for services; a sum of money paid or taken for doing, or forbearing to do, some act; specif., a recompense or premium offered, whether to an individual or to any of a class of individuals or of the public, by the government or a private individual for special or extraordinary services to be performed * * *" (Webster's New International Dictionary.)

The words "or otherwise" in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned. (Cent. Dictionary.) The phrase "or otherwise" when following an enumeration, should receive an ejusdem generis interpretation.

Here the evidence does not show that Mateus had anything to do with the transportation of Yamatoda for ransom or reward, or otherwise.

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seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive. (June 22, 1932, c. 271, § 147, 47 Stat. 326, as amended May 18, 1934, c. 301, 48 Stat. 781.)

"Sec. 408c. *Same; conspiracy.* If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of sections 408a and 408b of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as provided for by said sections. (June 22, 1932, c. 271, § 3, 47 Stat. 326, as amended May 18, 1934, c. 301, 48 Stat. 782.)

Every day police officers of large cities take men to the border of their States and tell them to get out of town. It used to be the common practice of the Los Angeles police department to collect all the hoboes coming in on freight trains, pile them into automobiles and escort them from the city with orders to get out of town and stay out. In fact, it was and still is common practice for the local courts of various cities to arrest and incarcerate men and only release them on condition that they stay out of town "for the next two years" or longer. Many persons who are put on probation are given railroad tickets and placed on trains to be sure that they leave the city and state.

Surely these things do not constitute kidnaping within the meaning of the statute.

The close proximity of El Centro to the Mexican border could easily have been the reason for ordering Yamatoda, the gambler, to leave town.

Nor does any of this fit the Government's theory in the case,—that the motives of the defendants were to obtain control of Yamatoda's interests. Mateus, a police officer, had no concern over Yamatoda's interests, and the record does not show that he had.

A close examination of the statute shows that in order to constitute a crime under Section 408a the following elements are necessary:

> (1) * * * knowingly transport or cause to be transported in interstate or foreign commerce;
>
> (2) * * * any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted or carried away;
>
> (3) * * * *and* held for ransom or reward or otherwise.

In other words, in order to constitute a violation of the statute there must be knowing transportation of an unlaw-

fully seized or kidnaped person in interstate commerce *and a holding of that person* for ransom or reward or otherwise.

In this case the evidence shows that Yamatoda was held under a warrant or complaint issued by a justice of the peace, and that he was therefore in lawful custody of the El Centro police department.

It is not shown that Mateus had any knowledge that the arrest was in any manner illegal, nor is there anything from which such an inference could have been drawn. The presumption that official duty was regularly performed and that Yamatoda was being held under a lawfully issued criminal complaint was one that Mateus had a right to rely on, and there is no evidence from which it could be inferred that he had any knowledge that Yamatoda was unlawfully seized or unlawfully kidnaped, if he was.

Mateus had a right to rely on the actions and activities of his superior officer, Oswalt, regarding whom the jury itself disagreed in every phase of this case. Even if it be presumed that, pursuant to some order of Oswalt, Mateus transported or participated in the transportation of Yamatoda, he still would have had a right to do so and Yamatoda would technically be in his lawful custody as a peace officer of El Centro at all times he was in that city and county, and the detention could only have become unlawful if Mateus had been holding Yamatoda for ransom or reward or otherwise.

But the Government does not contend that Mateus held Yamatoda for ransom or reward or otherwise. They claim that Mateus released Yamatoda and did *not* hold him for ransom or reward or otherwise.

Does a peace officer of a county seat city in a county adjoining the border become guilty of kidnaping for ransom, reward or otherwise when, instead of holding the person for ransom or reward or otherwise, he releases that person

as quickly as he can, or, when holding him in lawful custody, he releases him across the border when the man should have been held for further court proceedings in the United States?

There is no showing in the record anywhere that Mateus ever held Yamatoda for ransom or reward or otherwise. The statute recites not only the "transportation in foreign commerce," but in addition includes the words "and held for ransom or reward or otherwise." Hence there is a failure of proof where it is not shown that Mateus did these things.

V.

**Admission of hearsay evidence and evidence admissible only in connection with the conspiracy was highly prejudicial to the defendant Roul Mateus, not convicted on conspiracy.**

In view of the fact that Mateus was convicted only of the offense of kidnaping, in violation of Section 408a, and the jury disagreed as to the conspiracy charge, the great mass of testimony which was given in connection with the other defendants and which was complained of as hearsay and permitted to remain in the record over objections, thereupon became highly prejudicial to the defendant Mateus, whose guilt could not have been established unless inferences were gathered from the testimony relating to the conspiracy count. Also the Court should have granted the motion to strike as contained in pages 1030 to 1040, incl., Record.

There were conversations alleged to have taken place between Yoshida and Yamatoda in which Yamatoda asked for some milk and someone in the car said, "Don't ask for such luxuries as milk because you are going to die very soon. We are taking you to Mexico." These statements were made in Japanese (R. 319, 416). Then Asanuma

stated again, "This is your last time in the United States. If you start a fight you will be killed. The policemen in El Centro are friends of Yoshida and Yuge so don't try to run away" (R. 416).

All these conversations were outside the presence of Mateus and were permitted in the record at the trial under the conspiracy count. The prejudicial character of all this testimony against Mateus is apparent.

Again, Yamatoda claimed he cried out at one time regarding Ota, one of the defendants, "Help, he is trying to kill me" (R. 484). Mateus was not there. In fact, Ota and Yamatoda were arrested by policemen and taken to El Centro city police station (R. 320). Nevertheless these matters were highly prejudicial to Mateus.

The record is replete with the alleged acts of the co-defendants long before Mateus was even mentioned or had any knowledge. Many conversations were permitted in the record, including many threats (R. 316, 317, 401, 402). These could not help but have prejudiced Mateus to the point where he could not and did not receive a fair trial. Fair trial is one of the essentials of due process of law guaranteed by the Constitution of the United States. (See *Lisenba* v. *United States*, 86 L. Ed. 187.)

In *United States* v. *Ashe*, 2 Fed. (2d) 735, the Court held that "the trial of one for two felonies at the same time and before the same jury was a denial of due process of law."

In the case at bar there were not two indictments but a single indictment, in which the prosecutor carved two offenses out of the case.

It could not very well be that the jury, while disagreeing as to the conspiracy charge, could exclude from its mind the testimony that was given thereon in reaching its verdict as to the first count in the indictment. Thus the jury was permitted to mingle and confuse the charges.

Under the circumstances, we respectfully submit that Mateus was greatly prejudiced by the introduction of matters referring to the conspiracy allegedly indulged in by the Japanese defendants.

VI.

**The Trial Court erred in the admission of hearsay testimony in the case insofar as appellant Mateus was concerned, and in failing to strike the same.**

The Court erred in its rulings regarding the defendant Mateus in not striking the hearsay testimony of John J. Orth, George Gyllenhammer, J. E. Simpson, John Crousen, Ray Arriola, J. D. Campbell, Roy Whalen, Thornwall Rogers, Norboro Tsuda, Harry W. Horton, L. L. Ford, Alvin Gilmore Bucklin, Elmer W. Heald, Arion McCartney, Jr., Roy Dupont and Hideichi Yamatoda.

It was promised that this testimony would be connected up, but it was not connected up with Mateus.

Since the dragnet of this testimony was great it necessarily had a prejudicial effect on this appellant. We will file additional points and authorities on this matter as a supplement to this petition, and ask leave of Court to do so.

VII.

**The Court erred in sustaining an objection to the question asked of Yamatoda on cross-examination.**

We also wish to point out the error in the Court's ruling in sustaining an objection to a question asked of Yamatoda as to whether he was taken to Mazatlan, to which he answered, "I think so, and I so believe." When asked where he believed he was kidnaped from the Court sustained an objection, saying that the details couldn't possibly serve any useful purpose. In answer to the Court's comment Mr. Hervey stated:

"Unless, your Honor, he was kidnapped, for example, from the jail by officials who had him in custody, or was kidnapped from the home of the Japanese Consul where he was staying, and, apparently, would have had protection. If he was kidnapped from the jail, it will tend to show what basis there was for feeling he was kidnapped—if he was removed from a jail in which he was held in custody. If he was kidnapped from the Japanese Consul's home, it is for the jury to determine whether he could have been kidnapped under such circumstances with one of his countrymen there with that much power in Mexico" (R. 1061).

The appellant was entitled to the widest latitude in the cross-examination of Yamatoda, and it was particularly prejudicial to sustain this objection, because it went to the very essence of the charge of whether there had been any kidnaping from the United States into Mexico and rebutted the charge contained in the indictment that he was kidnaped from Los Angeles into Mexico.

It has been held that the right of cross-examination is a fundamental right to fair trial, and where there is any issue that goes to the very essence of the charge, as, for instance, the place from where the person was kidnaped from to the place where he was kidnaped to, the defendant is entitled to be given every latitude so that the jury may determine whether there has been any kidnaping at all.

*People* v. *Flores*, 15 Cal. App. (2d) 401;
*Heard* v. *United States*, 255 Fed. 829, 832;
*Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, 129 Fed. 688;
*Farkas* v. *United States*, 2 Fed. (2d) 644;
*King* v. *United States*, 112 Fed. 988;
*People* v. *Gallagher*, 100 Cal. 466, 476;
*People* v. *Turco*, 29 Cal. App. 608, 610.

For each and all of these reasons we respectfully pray for a writ of certiorari as to Roul Mateus, and reversal of the judgment.

Respectfully submitted,

MORRIS LAVINE,
*Attorney for Petitioner,*
*Roul Mateus.*

(1084)

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474913—42

# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 194

ROUL MATEUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the circuit court of appeals (R. 1090–1111) is reported at 127 F. (2d) 683.

### JURISDICTION

The judgment of the circuit court of appeals was entered March 19, 1942 (R. 1088), and a petition for rehearing was denied June 2, 1942 (R. 1112). The petition for a writ of certiorari was filed July 1, 1942. The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

STATUTES INVOLVED

The Act of June 22, 1932, c. 271, sec. 1, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides:

> Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: *Provided,* That the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive.

The Act of June 22, 1932, c. 271, sec. 3, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 782 (18 U. S. C. 408c), provides:

> If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of sections 408a and 408b of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as provided for by said sections.

## QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the conviction.

2. Whether petitioner's conviction on the substantive count is inconsistent with the jury's disagreement as to his guilt on the conspiracy count and, therefore, void.

3. Whether, in view of the jury's disagreement as to petitioner's guilt on the conspiracy count, reversible error resulted from the admission of testimony relating to acts and conversations of the other defendants outside of petitioner's presence which was admitted in proof of the conspiracy count.

## STATEMENT

Petitioner and nine others were tried in the United States District Court for the Southern District of California, on a two-count indictment (R. 2–9) charging in count one that they kidnaped one Hideichi Yamatoda and transported him from Los Angeles, California, to Mexicali, Mexico, and, in count two, that they conspired so to kidnap and

transport Yamatoda, in violation of the Federal Kidnaping Act (18 U. S. C., 408a, 408c, *supra*). Petitioner was convicted on count one, the jury disagreeing as to count two (R. 925), and was sentenced to imprisonment for three years and six months (R. 20–21).[1] On appeal to the Circuit Court of Appeals for the Ninth Circuit the conviction was affirmed (R. 1088).

Petitioner did not participate in the kidnaping of Yamatoda until after the latter had been brought from Los Angeles to El Centro, California, by other defendants. Since none of the other convicted defendants have sought review, it is sufficient to summarize the history of the conspiracy prior to petitioner's participation therein, the full facts of which are delineated in the opinion below (R. 1092–1099).

Over a period of more than a year petitioner's Japanese co-defendants conspired to obtain control of the Tokio Club, an alleged Japanese gambling syndicate, and the Japanese Film Exchange in Los

[1] Defendants Sonoda and Ota were convicted on both counts (R. 925, 926); Yuge and Yoshida were convicted on count two, the jury disagreeing as to count one (R. 926–927); Asanuma and Nakashima were acquitted by direction of the court on count one and by the jury on count two (R. 923–924); Ugawa was acquitted by direction of the court on both counts (R. 923–924); the jury disagreed on both counts as to Oswalt (R. 928); and on the Government's motion the court granted a dismissal as to Henry (R. 570). All of the convicted defendants appealed, but petitioner alone seeks review in this Court.

Angeles, California, operated by Hideichi Yamatoda (R. 37–41, 45, 128–129, 136, 305, 315–316, 401). Their *modus operandi* was to get Yamatoda out of the way by attempting to have him convicted for some crime; they twice reported him to Federal Narcotic Agents as being engaged in the importation of narcotics from the Orient (R. 37–41), and once obtained his arrest for murder (R. 40, 148–149, 305–307, 373–377, 737–739). Finally, the defendant Oswalt, Chief of Police at El Centro, California (R. 598), who was friendly with Yamatoda's rivals (R. 63, 81–84) and who was determined to put Yamatoda "behind the bars" because, Oswalt said, Yamatoda had previously tried to put him "behind the bars" (R. 777–780), procured the issuance by El Centro authorities of a warrant for Yamatoda's arrest on a gambling charge and with the help of other defendants apprehended Yamatoda in Los Angeles and brought him to El Centro a prisoner (R. 159–160, 163–165, 168–173, 214–215, 309–310, 313–315, 395–396, 398, 605–610, 701–702, 748–752, 780, 782). At El Centro, threats were made against Yamatoda's life if he did not give up control of his gambling syndicate to certain of the defendants and go back to Japan (R. 315–316, 400, 401). He was then taken to the county jail and held in custody (R. 285, 317, 403, 407–408). One of the Japanese defendants obtained his release on bail and, in company with others, forcibly carried him away from the jail in their car (R. 277-278,

281, 317–318, 480); Yamatoda attempted to escape, but was recaptured by the El Centro police and returned to the El Centro police station and the defendants threatened to take Yamatoda to Mexico and throw him in the desert (R. 268–274, 286–288, 318–323, 412–413, 415–416, 418–422, 425–428, 480–486).

Petitioner, who was a "special officer" employed at a Japanese gambling club in El Centro operated by Yoshida (R. 66, 78, 89, 90, 772), became a participant in the affair after Yamatoda had been returned to the police station. Thus, after Yamatoda had been questioned and threatened he was taken to the outer room of the El Centro police headquarters. It was then about 1:30 or 2:00 o'clock on the morning of December 24, 1938. Petioner and the defendants Oswalt, Ota, Yuge and Yoshida were there in addition to the desk sergeant and some policemen. (R. 222–223, 288, 323, 430.) Oswalt put handcuffs on Yamatoda and then tightened them (R. 238, 324, 433–434). His $2,500[2]

[2] When Oswalt arrested Yamatoda in Los Angeles the latter had on his person beneath his underclothing a belt which he wore to protect his abdomen, and in which he was carrying $2,500 in five $500 bills. This was not discovered in Los Angeles, as they searched only his pockets (R. 392–393). During the fight at the gasoline station in El Centro, when Yamatoda had escaped from the Japanese defendants and was trying to use the telephone, he pulled out one of the $500 bills and offered it to any of the bystanders who would take him to Los Angeles (R. 420). When he was taken back to the El Centro police station the $2,500 was taken from him (R. 320–321).

was returned and then Oswalt told him to "Go, get out," and pushed him out of the station (R. 324–325). Yuge, Ota, Yoshida and Oswalt came out of the station with him, petitioner preceding them, in the fashion of "a football huddle, they get somebody in the middle and take him along" (R. 291, 297, 325, 434, 499). When they got to the sidewalk, petitioner was standing at the door of a yellow coupe; Oswalt told Yamatoda to get in the front seat, petitioner held the door open and pushed Yamatoda in and then got in behind him. Another officer, Keating, was at the wheel. (R. 325, 434–435.) The coupe then started out and while they were driving along Yamatoda grabbed the wheel in an attempt to cause a collision, but petitioner pulled him back by the neck. Later they stopped at a field or ranch behind a sedan and Oswalt, Yuge, Ota, Sonoda, and Yoshida got out of a sedan and came back to the coupe. Oswalt said, "This is your last chance. Do you want to go to Mexico and die?" Yamatoda said he did not want to go to Mexico, whereupon Oswalt pulled him out of the coupe and removed the handcuffs. Petitioner was holding open the door of the "turtleback" or luggage compartment of the coupe and had a gun in his hand. At Oswalt's direction Yamatoda got into the turtleback and Sonoda got in with him, Oswalt warning Sonoda not to "monkey around," the door was closed down and the coupe started moving. (R. 326–328, 435–437.) After

about 15 or 20 minutes it stopped, and the turtleback was opened. Petitioner, standing close by, gun in hand, ordered Yamatoda to get out, saying, "If you holler I will shoot." (R. 328, 438.) Petitioner then handed some tape to Sonoda and told him to put it over Yamatoda's eyes and mouth, and then, after searching Yamatoda, ordered him back into the turtleback and warned him that if he cried out he would be shot from the front seat. Yamatoda then got back into the turtleback with Sonoda and the car started moving again. (R. 328–329, 438–439.) The car stopped once and there was a conversation in Spanish, and after the car started up again Yamatoda, who had not been taped, yelled out, whereupon Sonoda said, "If you holler you will be shot from above, so shut up" (R. 331). Five minutes later the car stopped again. Petitioner, with a gun in his left hand, again opened the turtleback and ordered Yamatoda out. Sonoda said, "This is Mexico."[3] Petitioner took Yamatoda's money (the $2,500), and told him to move on or be shot. Yamatoda ran about twenty feet, then yelled back to petitioner asking for one of the five $500 bills petitioner had taken from him. Petitioner refused to let him have that much and Sonoda ran to Yamatoda, put three or four $5 bills in his pocket, and ran back. The last Yama-

[3] Yamatoda identified Government Exhibit 48, a picture taken in Mexicali, Mexico (R. 329), as "the place I alighted from the yellow coupe" on the morning of December 24th (R. 332).

toda saw of petitioner the latter was putting his right hand in his pants pocket. Yamatoda then went over a three-foot fence and walked toward a house with a light in it. (R. 331–332, 442, 446.) At or after two o'clock that morning Yamatoda walked into a police station in Mexicali, Mexico, and about an hour later, with the assistance of two Mexican police officers and an interpreter, Yamatoda found Sonoda in a hotel room in Mexicali (R. 336, 338, 487.) A United States Customs Inspector stationed at the international border between Calexico, United States, and Mexicali, Mexico, and who had known petitioner for several years, observed petitioner driving a car from Mexico into the United States between 1:30 and 2:30 that morning, and Keating was with him. The car was "a late model cream-colored or canary-colored coupe with a long turtle back door in the back" and petitioner told the Inspector, "it's the boss' car." (R. 527–528.)[4]

On December 27, 1938, in the presence of the Japanese consul at Mexicali and Mexican Immigration officials, Yamatoda signed a statement to the effect that early on the morning of December 24th "while visiting in the City of Calexico" he inadvertently walked across the border into Mex-

[4] Another witness testified that he saw a yellow car at the Oswalt home in El Centro, where he was a dinner guest, on the evening of December 23, 1938, and that petitioner was also there at the time (R. 187–188).

ico, alone (R. 358–360). At the trial, however, he denied that he ever gave any such explanation of his presence in Mexicali (R. 363, 446–447), and stated that "I told [the consul] everything about the kidnapping, but was told 'It won't do, but if you sign this paper you can go back' " within ten or fifteen days. The consul told him, he said, "If you bring up the case of the kidnapping in Mexico, you will never be able to go back to America soon. It will take a year, or two years or three years before you can." (R. 444–445.)

## ARGUMENT

### I

Petitioner contends that the evidence is insufficient to support the verdict in that the Government failed to prove: (1) that Yamatoda was transported across the Mexican boundary line (Pet. 22–31), or (2) that petitioner "was present on the alleged kidnapping trip" (Pet. 31–33), or (3) that he made any demand for ransom or reward or knew that his co-defendants had made any such demand (Pet. 41–46). Although, as the court below said, "the whole affair is lurid and melodramatic" (R. 1092), the record plainly shows that petitioner's contentions are untenable.

1. The evidence fully warranted the jury in finding that Yamatoda was put out of the car in Mexico. Yamatoda was told that he was being taken to Mex-

ico (R. 323, 326);[5] when he was put out of the car defendant Sonoda said, "This is Mexico" (R. 446);[6] Exhibit 48 was identified as a picture of the place in Mexicali where they left him (R. 329, 332); and shortly after the kidnaping a United States Customs Inspector saw petitioner and Keating driving from Mexico into the United States at the Mexicali-Calexico border line in a car which fitted Yamatoda's description of the one in which he had been abducted (R. 527–528). In view of this evidence, it is immaterial if, as petitioner asserts (Pet. 22, 25–26), Yamatoda did not know of his own knowledge at the time, whether he was across the border when he was put out of the car.

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[5] Petitioner variously asserts that Yamatoda's testimony is unworthy of belief because of his alleged disreputable character (Pet. 2, 6, 8, 11–12, 44) and because his story is "inherently improbable" (Pet. 4, 12, 22, 31). Obviously, however, the witness' credibility was for the jury to determine. *Glasser* v. *United States*, 315 U. S. 60, 77. Furthermore, petitioner points to nothing in Yamatoda's version of what took place which is manifestly false or which in any way conflicts with known facts or scientific truths so as to render it inherently improbable (cf. *Kelly* v. *Jones*, 290 Ill. 375, 378 (1919); see note 8 A. L. R. 796 *et seq.*). Petitioner also overlooks the fact that Yamatoda's account at the trial was substantially corroborated by the testimony of other Government witnesses (see R. 73, 89, 92–93, 99–100, 127–128, 172–174, 187, 192, 193, 215–216, 218–219, 222–223, 234, 268, 277–278, 279, 285–289, 496–500, 510, 527–528).

[6] Contrary to petitioner's assertion (Pet. 28), the record shows that he was present when Sonoda made the statement (R. 331–332, 442, 446); hence his objection to its admissibility is not well taken.

2. Yamatoda expressed no doubts as to petitioner's presence on the trip into Mexico. He testified: It was petitioner who held open the car door in front of the police station and pushed Yamatoda in (R. 325, 435); when Yamatoda grabbed the wheel petitioner pulled him by the neck (R. 326); petitioner held open the door of the turtleback of the car when Yamatoda was forced into it, and later, with gun in hand, threatened to shoot Yamatoda if he cried out (R. 328); when the car stopped in Mexico petitioner, again with his gun in hand, ordered Yamatoda out, took his money and then told him to move on or be shot (R. 331). The United States Customs Inspector, moreover, was positive that it was petitioner, whom he had known for several years, who drove from Mexico into the United States at the Mexico-Calexico border in a yellow coupe shortly after the time Yamatoda claimed he was abandoned in Mexicali (R. 527–528).

3. While the evidence does not show that petitioner made any demand for ransom or reward, it does show that he benefited financially from the kidnapping to the extent of $2,500 which he took from Yamatoda at the point of a gun (R. 331). Furthermore, the application of the statute "is not restricted to cases involving pecuniary benefit to the kidnappers," for "Congress * * * intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to

himself to induce him to undertake it," *United States* v. *Parker,* 103 F. (2d) 857, 861 (C. C. A. 3), certiorari denied, 307 U. S. 642, citing *Gooch* v. *United States,* 297 U. S. 124. And since petitioner undoubtedly expected to gain favor with his chief (Oswalt) by helping his friends dispose of their rival and by helping him to gain the revenge he desired, it is clear the petitioner's motives came within the condemnation of the statute, even if he had not reaped a $2,500 reward. Finally, we submit that it is a reasonable inference from all of the evidence that petitioner could not have been unaware of the reasons why his co-defendants wanted to remove Yamatoda, and that, therefore, he knowingly aided and abetted the perpetration of the crime.[7]

## II

Petitioner contends (Pet. 33–40) that his conviction on the substantive count is inconsistent with the jury's failure to agree as to his guilt on the

[7] In this connection, petitioner now advances the bizarre suggestion that Yamatoda's abduction "could easily have been" no more than the commonplace practice of peace officers in running undesirables "out of town" (Pet. 44–46). Even if this were true, however, such a practice would be no defense under the circumstances of this case. Again, if that were all that happened, it is obvious that petitioner would have so testified, but he contented himself with mere denials of any participation in the affair (R. 768–769). On the other hand, the manner in which Yamatoda was transported across the border, robbed of his money, and then left in a foreign country, wholly belies petitioner's suggestion.

conspiracy count, because "under the facts * * * it would have been impossible for Mateus to have committed the substantive offense unless he had conspired with the others to commit it." This contention was, apparently, not raised in either of the courts below; there was no acquittal of petitioner on the conspiracy count but merely a disagreement as to that count; and, as was held by this Court in *Dunn* v. *United States*, 284 U. S. 390, 393–394, consistency in the verdict is not required.

Furthermore, petitioner does not point to any specific facts in the record which necessarily render the verdict on the substantive count inconsistent with the jury's failure to agree on the conspiracy count, and we know of none. On the contrary, as we have shown, there is ample evidence from which the jury may have found that he knowingly aided and abetted in the kidnaping of Yamatoda, even if we assume that he was ignorant of all the details of the conspiracy carried on by the other defendants (see pp. 6–9, *supra*).

Similarly, there is no merit to petitioner's contention that since the jury disagreed as to the guilt of Oswalt, his chief, "the verdict was inconsistent and void," as to him (Pet. 40–41). There is nothing in the record to show that petitioner was following Oswalt's orders, and even if he did, that fact would not excuse him. Hence, as the court below held (R. 1110), "there is nothing at all inconsistent with the verdict." See 18 U. S. C. 566.

## III

Petitioner argues (Pet. 46–48) that since the jury disagreed as to his guilt on the conspiracy count, it was prejudicial error to admit testimony relating to acts and conversations of the other defendants outside of his presence. It is plain, however, that a *prima facie* showing of petitioner's participation in the conspiracy was made, and therefore the evidence complained of was properly admitted under the rule that the acts and declarations of co-conspirators are binding upon those who subsequently join the conspiracy. *Marron* v. *United States*, 8 F. (2d) 251, 257–258 (C. C. A. 9); *United States* v. *Manton*, 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *McDonald* v. *United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Laska* v. *United States*, 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689. As the circuit court of appeals stated, the adoption of petitioner's contention would "require a trial judge in each instance to foresee just what decision the jury will reach as to each alleged co-conspirator before he could rule upon the admissibility of evidence of acts and declarations of the co-conspirators" and "would practically abrogate the rule of responsibility of all members of a conspiracy for acts of the other conspirators" (R. 1104–1105).[9]

[9] Petitioner also argues (Pet. 48–49), but does not present as a question for review, that the trial court improperly lim-

## CONCLUSION

The decision below is correct; there is no conflict of decisions, nor any question of general importance. Review is sought principally upon questions of fact decided by a jury and left undisturbed by two courts, and petitioner makes no showing which would warrant further review by this Court. *Delaney* v. *United States,* 263 U. S. 586, 589–590. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
*Solicitor General.*
WENDELL BERGE,
*Assistant Attorney General.*
OSCAR A. PROVOST,
ANDREW F. OEHMANN,
*Attorneys.*

AUGUST 1942.

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ited his cross-examination of Yamatoda concerning events which occurred in Mexico subsequent to December 24, 1938, while he was in custody of the Mexican immigration officials and the Japanese consul at Mexicali (R. 452, 453–454). The information sought was properly excluded on the ground that it raised a collateral matter which, as the trial judge said, could not "possibly serve any useful purpose in this lawsuit" (R. 452). *Glasser* v. *United States*, 315 U. S. 60, 83; *Alford* v. *United States*, 282 U. S. 687, 694; *Lucas* v. *Brooks*, 18 Wall. 436, 454; *United States* v. *Manton*, 107 F. (2d) 834, 845 (C. C. A. 2), certiorari denied, 309 U. S. 664.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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# No. 194

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ROUL MATEUS,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## PETITIONER'S REPLY BRIEF.

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MORRIS LAVINE,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 194

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ROUL MATEUS,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

---

## BRIEF IN REPLY TO GOVERNMENT'S OPPOSITION TO CERTIORARI.

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*To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices thereof:*

The wily Jap has succeeded again. Yamatoda, the gambler, was being put away by his rivals, who sought to have him tried and convicted of narcotic violations, murder, etc., and did succeed in having him convicted in the state court of California of murder.

But Yamatoda was not to be outlawed by the law. This he reserved for his rivals. He evaded the state's murder "rap" by a reversal. (See *People* v. *Kinowaki et al.*, 39 Cal. App. (2) 376). Then he called into play the Lindbergh Kid-

naping Law on his Japanese adversaries. This was after he had consulted private counsel. His former story of walking into Mexico was changed to "Kidnaping," and Yamatoda's legal jiu jitsu caused his rivals to "fall." The principal "hold" was the Lindbergh Kidnaping Law.

By his conviction, Mateus is the only non-Japanese and non-rival found guilty of violation of this statute.

It is respectfully submitted that the Lindbergh statute was never meant, or intended by Congress, to have the use to which Yamatoda put it in this case. To Mateus, whom it was necessary to throw in this manner, Yamatoda is probably saying, "So sorry. Excuse it please." His objective was his Japanese rivals.

The Government's brief in opposition does not answer the contention of congressional intent as applied in this case. A hearing on certiorari is necessary to define the purposes of the act as intended by Congress and to prevent misuses of the act (under such a faulty interpretation) by one gambler to outlaw rivals and imprison them, and take an American with them.

The history of the statute is well known. The Lindbergh baby was taken and held for *ransom and reward.*

Here, the Government concedes that *Mateus* at no time made any demand for *ransom or reward,* but it now advances the bizarre suggestion that the petitioner took $2500 from Yamatoda at the point of a gun. In the next breath it does not consider this the purpose and says: "And since petitioner undoubtedly expected to gain favor with his chief (Oswalt) by helping his friends dispose of their rival and by helping him to gain the revenge he desired, it is clear the petitioner's motives came within the condemnation of the statute, even if he had not reaped a $2,500 reward."

The test is its purpose at the time of the alleged taking or kidnaping.

It was never the Government's theory in the trial that Yamatoda was kidnaped for $2,500, or that Mateus joined in a kidnaping to gain favor with his boss, Chief of Police Oswalt. This is advanced for the first time in this court, and was not even urged in the Circuit Court. This petition is from the errors in the trial court upon the theory upon which the Government tried its case there. It was there urged that the whole purpose and motive of the alleged kidnaping was to put Yamatoda out of the way so his rivals could run his gambling business.

THE STATUTE SAYS: "WHOEVER SHALL *KNOWINGLY* TRANSPORT * * * AND HOLD FOR RANSOM OR REWARD * * *"

The transporting must be *knowingly* for the *purpose of ransom and reward.* It is conceded no such purpose was shown. Seeking favor with one's boss, the Chief of Police, who is not being transported, is not the ransom or reward as contemplated by the statute.

The Government further says: "Finally, we submit that it is a reasonable inference from all the evidence that petitioner could not have been unaware of the reasons why his co-defendant wanted to remove Yamatoda."

Thus the statute requires that *guilty knowledge* be specifically proved as an element of the crime, and that the guilty knowledge must include the guilty knowledge of the *ransom and reward,* and it cannot be left to surmise, conjecture or "reasonable inference" where the evidence fails to establish this positively and beyond a reasonable doubt. And, necessarily, under the record as here exists, which inference could not be gained under any circumstances unless the jury took into consideration matters relating to the conspiracy charge of which petitioner was not convicted, and therefore such testimony was inapplicable and improper as to this petitioner,

Under its heading "Argument", the Government presents: "1. The evidence fully warranted the jury in finding that Yamatoda was put out of the car in Mexico." (Government's Brief, p. 10.)

To support this finding the Government advances the following: (a) "Yamatoda was told that he was being taken to Mexico." (p. 10) This, of course, is rank hearsay and establishes nothing.

(b) "When he was put out of the car defendant Sonoda said, 'This is Mexico.'" (p. 11) This is more of the same character of hearsay and does not establish that the place was Mexico.

(c) "Exhibit 48 was identified as a picture of the place in Mexicali where they left him." (p. 11) Regarding Exhibit 48 the witness said: "Exhibit 48 is Mexico." This was Yamatoda's conclusion. No one else identified it as Mexico. He continued: "I was at this place about two o'clock in the morning of December 24, 1938. Sonoda, Mateus and Keating were with me at that time. This is the place I alighted from the yellow coupe indicated by a red 'X' on the exhibit. After Mr. Sonoda put the money in my pocket he said, 'That is the power house. Nobody is there,' and he ran toward the direction which I thought was west. I did not see Mateus or Keating at that time but I did not follow Sonoda. I did not see any other people in the street. I ran to a house on the other side of the street where there was a light. I knocked at the second of two doors to the house. A woman yelled in a loud voice that I thought was Spanish. After I talked to this lady in the house I crossed the street and walked toward a lighted house" (R. 332, 333).

> "The Court: Now, just a moment. Is it the contention of the Government that any of the defendants were present after the running westward of Mr. Sonoda?

"Mr. Shire: No, your Honor, these are merely connecting up circumstances."

There is no evidence in the record that Exhibit 48 was Mexico.

The Government further says: "* * * shortly after the kidnaping a United States Customs Inspector saw petitioner and Keating driving from Mexico into the United States at the Mexicali-Calexico border line in a car which fitted Yamatoda's description of the one in which he had been abducted." (p. 11)

Keating, of course, was never accused. He denied he had taken Yamatoda into Mexico (R. 582).

The return of this automobile from Mexico by Keating and Mateus was no proof that Mateus had taken Yamatoda into Mexico. The same customs inspector who claims to have seen these two men come into the United States did not testify to seeing them go into Mexico with Yamatoda, and it is a fact of which this Court may take judicial knowledge that cars crossing the border, going either way, are examined by customs inspectors on both sides of the line.

The Government says: "In view of this evidence, it is immaterial if, as petitioner asserts, Yamatoda did not know of his own knowledge at the time, whether he was across the border when he was put out of the car" (p. 11).

But it is material for this case for the Government to prove where Yamatoda was put out of the car, and whether he was put out of the car in the United States or in Mexico. This essential element of the charge must be proved by substantial evidence. Somebody must know whether Yamatoda was transported across the border, and his statements against his rivals which he thought up several days later, after he had told the immigration officers he had walked across the border alone, cannot be classed as substantial evidence.

In its argument the Government asserts in a footnote that petitioner's contention that Yamatoda's testimony is unworthy of belief because of his disreputable character and because his story is inherently improbable is answered by the case of *Glasser* v. *United States*, 86 L. Ed. 405, 416, which asserts that the witness's credibility was for the jury to determine. The Glasser case is easily distinguishable, because there the testimony against the defendant was "*largely that of accomplices and unsavory characters.*" There were others who were not accomplices or unsavory characters.

In this case the only testimony regarding the alleged kidnaping for ransom and reward in foreign commerce was that of Yamatoda, who, under oath, had given a contradictory statement to the Mexican Immigration officials. In one case or the other he had disregarded the truth and was willing to make a statement which he claimed would be beneficial to him in getting back to the United States, and it becomes a question of law as to whether the whole of the testimony should not thereafter be disregarded.

(*Speiller* v. *United States*, 31 F. (2d) 682; *Sykes* v. *United States*, 204 Fed. 909, 913.)

In the Sykes case it is held:

> "'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon testimony of accomplices, and to require corroborating testimony before giving credence to them.' Holmgren v. United States, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Am. Cas. 778.) And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the

perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substanial evidence of it. Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158."

The Government seems to inferentially recognize this rule by pointing to testimony that it says corroborates Yamatoda's fantastic and unbelievable story. But an examination of each of these references pointed out by the Government, just as in the Sykes case, shows them to relate to certain facts regarding Yamatoda's arrest and the proceedings, all of which Yamatoda knew that other persons knew and could corroborate. None of the alleged corroboration goes to the kidnaping for the *purpose of ransom* or reward or otherwise, and none shows that Yamatoda was transported in foreign commerce.

The Government's references are also to matters before, admittedly, Mateus entered into the case at all. There is no corroboration that Mateus held open the car door in front of the police station and pushed Yamatoda in; there is no corroboration that Yamatoda grabbed the wheel or that petitioner pulled him by the neck; there is no corroboration that petitioner was on a trip to Mexico in the car with Yamatoda; there is no corroboration that petitioner ordered Yamatoda out, took his money or told him to move on or be shot. Evidence that Mateus was in Mexico after Yamatoda claimed he was abandoned in Mexacali is not corroboration of any of the facts or circumstances claimed by Yamatoda.

The Government blows hot and cold,—first saying that the petitioner benefited financially to the extent of $2,500, a claim which was not advanced by the Government at the trial of the case as the purpose and object of any kidnaping,—then it abandons that claim and asserts that petitioner was trying to gain favor with his chief, Oswalt, by

helping his friends dispose of their rival "even if he had not reaped a $2500 reward."

While consistency is not necessary in any verdict, still, where a jury cannot agree that a person is guilty of conspiracy to commit an offense, their finding that he committed the offense—which necessarily requires proof that there was a conspiracy—is blowing hot and cold, and, as stated in *Speiller* v. *United States,* 31 F. (2d) 682, "When the liberty of a citizen is at stake a jury will not be permitted to make a plaything of a verdict and blow hot and cold at the same time."

Yamatoda's testimony is very much like the story of Mrs. Callahan in the case of *Sykes* v. *United States,* 204 Fed. 909, wherein her testimony was contradictory, and contradicted under oath by herself,—inspired by the hope of immunity from punishment.

In the case at bar Yamatoda's testimony was contradictory, evasive and uncertain. He contradicted his own declaration to the immigration officers in Mexico. His testimony was inspired, not by the hope of immunity from punishment, but by the hope of vicious Japanese vengence which he sought to inflict upon his Japanese rivals, which in this case, "has since turned to glad fruition." Such testimony is not only insufficient to establish the guilt of the petitioner beyond a reasonable doubt, but it presents no substantial evidence as to his guilt. (*Sykes* v. *United States,* 204 Fed. 909, 913; *Jahnke* v. *State,* 68 Neb. 154, 104 N. W. 154, 158.)

II.

Appellee says that petitioner contends that his conviction on the substantive count is inconsistent with the jury's failure to agree as to his guilt on the conspiracy count because under the facts it would have been impossible for Mateus to have committed the substantive offense unless he

had conspired with the others to commit it. (Appellee's Br. pp. 13, 14.) Appellee says this contention was not raised in the court below. However, it was impossible for petitioner to have raised this question in the court below since he was tried on an indictment which charged him with both conspiracy and a substantive offense.

Originally, and at common law, every offense charged had to be by separate indictment. By statute it is now proper to charge both the conspiracy and the substantive offenses in a single indictment. But where, as here, the same jury heard the evidence in both the conspiracy and the substantive offenses, it was bound to be prejudiced against petitioner on the substantive offense by reason of matters brought out under the conspiracy charge, which it could not obliterate from its mind after once having heard the testimony. Guilty knowledge on the part of the petitioner could exist only if he had knowledge of the conspiracy and the events which took place prior to his being brought into the case.

Absence of connection with or knowledge of the events which preceded the morning of December 24th, when Yamatoda says he was transported into Mexico, is inconsistent with any acts of "kidnaping for ransom or reward," and precludes the inference or thought that petitioner was one of the conspirators. The fact that it is only those events which took place in Los Angeles long before petitioner was ever known or heard of in the picture on which any possible claim of kidnaping for ransom or reward was sought by the Government, and the failure to find the petitioner guilty of conspiracy are both inconsistent with any finding of guilt on the substantive offense.

Also, one who is not a conspirator is not an aider and abettor. (*United States* v. *Falcone*, 109 F. (2d) 579, 85 L. Ed. 128.)

Appellee also says that the disagreement of the jury as to the guilt of Oswalt, the Chief of Police, was inconsistent and void as to the petitioner. The record shows that petitioner, if he was acting at all, was acting under the jurisdiction of his superior, the Chief of Police, and the presumption of law is that official duty was regularly performed, if the petitioner was acting.

## III

Appellee implicitly concedes that the petitioner was prejudiced when it argues that because a prima facie showing of petitioner's participation in the conspiracy was made it was therefore proper to admit testimony regarding the acts and declarations of co-conspirators.

Appellee then argues, in accordance with the Circuit Court's decision, that "the adoption of petitioner's contention would require a trial judge in each instance to foresee just what decision the jury will reach as to each alleged co-conspirator" * * * and "would practically abrogate the rule of responsibility of all members of a conspiracy for acts of the other conspirators." (Appellee's Br., p. 15.)

This is but another way of saying that although the petitioner was not convicted of conspiracy it was proper to admit all this mass of evidence regarding the conspiracy into the case against petitioner, and to permit the jury to consider it in finding him guilty of the substantive offense. The prejudicial weight of such a mass of irrelevant, incompetent, prejudicial and shotgun immaterial testimony regarding a conspiracy against petitioner, who was not found guilty of the same, was so great that no jury could eliminate it in considering the substantive count. It is an impossible legal proposition for a jury to unscramble eggs and separate the white of conspiracy from the yolk of the substantive offense.

**Conclusion.**

It is respectifully prayed, therefore, that this Honorable Court grant certiorari to the lone, non-Japanese petitioner, Roul Mateus. The legal propositions presented by this appeal raise important Federal questions of general importance not heretofore decided by this Court, as to the scope, purposes and Congressional intent of the Lindbergh Kidnaping Law, and the question of what constitutes substantial evidence to sustain a conviction in the courts of the United States, and whether, under the facts of this case, the petitioner was so greatly prejudiced by testimony which did not relate to him as to require a reversal of the judgment.

Respectfully submitted,

MORRIS LAVINE,
*Attorney for Petitioner.*

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